

07/26/2002 Entry: "Attorney in Captive Supply Case Seeks Cattlemen's Help"

Attorney In Captive Supply
Case Seeks Cattlemen's Help
By David Bowser

OMAHA, Neb. — David Domina says that when he was growing up after World War II, he heard that one of the catch phrases of the war was "Take the war to Tokyo" or "Take the war to Berlin."

"That was because when the war got to Tokyo and when the war got to Berlin, the war was over, and the Americans knew that," Domina says.

At a recent meeting here concerning the crisis in cattle pricing, Domina says he heard talk about taking the battle over captive supply to Washington.

"That's important," he says, "but I think the war is in Dakota City and in Omaha and in Minneapolis and wherever it is that the decision to use captive supply is made."

Domina says the only way to take the war there is to do it with litigation.

"As distasteful as that might be, I know of no other way," he says.

Domina is one of the lawyers representing cattle feeders in Pickett v. IBP.

The U.S. district court has certified the lawsuit as an anti-trust class action case against IBP. Class members include all cattle producers who sold fed cattle directly to IBP from February 1994 through and including April 30, 1999, when the class was certified.

As a trial lawyer, Domina questions the advantage of additional legislation concerning captive supplies. He says a clear win against the packers in court will do more to overcome captive supply problems than new laws.

"I've heard about what a new law might do," Domina says. "I've watched the packer ban controversy with much interest."

He says he likes to think of a law as a rock.

"But like rocks in any stream," he says, "a law is a rock that exists in a current, in an economy, in the movement of life, in the flow of not water but cash. Like a rock in a stream, eventually money finds its way around a wall."

Domina indicates that packers spend millions in Washington, and not without reason.

"The fight's got to be where the enemy is, not where the enemy wants to fight," Domina says. "You can't outspend the packers. Why engage them in the spending process with lobbyists?"

On the other hand, Domina thinks the IBP case, styled Pickett v. IBP, can bring packers into line.

Henry Lee Pickett, Sam Britt, Paul Horton, Mike Callicrate, Jim Bower, Pat Coggins, Johnny Smith, Stayton Weldon, Lovel Blain and David Smith, the plaintiffs in the lawsuit, are cattle feeders who allege that IBP's practices violate the Packers and Stockyards Act. They are seeking damages and injunctive relief.

"You can win captive supply cases," Domina says. "This Pickett case looks really good."

Two other cases, Murdoch v. Excel and Lueking v. ConAgra, filed in May, also look favorable for cattlemen, he says.

Domina says the most important federal employees to address the question of captive supply by packers at the moment are the federal judges who will decide the cases.

"That's the way it is," says the veteran trial lawyer.

In a plea for support, Domina says it is cattle producers who are addressing the issues involved in captive supplies and cattle pricing, not national organizations.

He says individual cattlemen have volunteered to change the system and are deserving of support.

"They just wanted to do something," Domina says. "They have volunteered. Henry Pickett, whose name is associated with Pickett v. IBP because he's the first named plaintiff, is from a little town near the coast of Alabama. He's never been outside the state of Alabama, but his case and the case associated with his name will affect your markets."

Reading the list of the plaintiffs, Domina says they will be the ones to decide the future of the cattle business.

"These are the people who will be at the table when there is a discussion, either with the court or with Tyson's IBP division, about the question of what kind of injunction should be issued against one of the companies that we allege is engaged in captive supply if we prevail at trial," Domina says. "No president of

the NCBA will be there. No president of a state cattlemen's association will be there. The plaintiffs in the lawsuit and their lawyers will attend that discussion, and nobody else."

In early May, two brothers named Murdoch from Nebraska filed a lawsuit against Excel, and two other men from Nebraska filed a lawsuit against ConAgra.

"They have volunteered to be your representatives in the next round of litigation over the question of captive supplies by the largest three slaughter houses in the United States," Domina says. He accuses the packers of using captive supplies to depress cash prices of cattle.

Domina says the cases are based on the theory that if a company needs 100 of something to do what they do and they've got 50 of them locked up, do they work as hard for the remaining 50 as they would have worked for the entire 100?

Domina doesn't think so.

For the first time since 1921 when the Packer and Stockyards Act was signed into law, Domina says, a case, Pickett v. IBP, has been certified as a class action.

"It took five and a half years to get to a point where we had enough data from IBP, enough material that we could give it to an economist, because we do need one for legal purposes," Domina says. "I don't know that the jury will be so interested in the economists, but we very much need one for legal purposes."

That economist is Dr. Bob Taylor, formerly with Texas A&M University, now with Auburn.

"He's quiet, soft-spoken, gentle Bob Taylor from Auburn University, who for five days answered questions in deposition for IBP lawyers and didn't yield one time," Domina says.

Domina says the lawsuit is the result of people taking a stand.

"There are people who think it's wrong that the packers can fill up Monday, Tuesday, Wednesday, maybe Monday through Friday, maybe Monday through Friday and Monday through Wednesday of next week some of the time, the major packers, and not be in the market," Domina says. "Some of those people have contributed some money to keep us going. Some of them have given some depositions in this case to give us testimony to keep us going. Without them, we wouldn't be in court and this case would be dead, and we'd be another 20, 30, 40 years before an 80 year-old statute would have life."

That statute, the Packers and Stockyards Act, was signed into law by President Warren Harding, in maybe his only great Presidential act, Domina says.

"Since then," he says, "for the most part, what has happened is that there has been an ebb and a flow and an ebb and a flow in the number of packers and the amount of captive supply that we've had."

When the statute became law, Domina says, the big five packers controlled about 44 to 45 percent of the market. Today, that number is about 85 percent for the big four packers and approaching 80 percent for the big three, he says.

"That's assuming that you use the numbers they like to admit," Domina adds.

He became involved in legal issues concerning captive supplies after a meeting in Omaha in which another lawyer, a friend of Domina's, stood up, spoke out and was sued by the packers.

"I volunteered to defend him," Domina says. "I volunteered to defend him because I'd known him a while. I knew that his heart was in the right place, even if his mouth wasn't. He needed the help, and he was probably substantially correct."

As a result of that, Domina and the other lawyer spent seven or eight days in trial in Lincoln, Neb., in federal court with IBP, and the lawyers won the lawsuit.

"I didn't get paid," Domina says. "I didn't ask to be. What I did get to do in the course of the lawsuit was to see some inside IBP data. It's old data now, and I can't tell you about the new data that we've seen because that new data has been ordered held confidential until you all get notices as class members if you've sold anything to IBP since 1994. But the old data shows that at least at some times, in handwritten material kept by the vice president of cattle procurement at IBP, the company could be out of the market at some of its plants because it was 110 or up to 122 percent overbought. Not for this week, but for next week. I don't suppose that's gotten worse, do you?"

Domina says he's optimistic about the lawsuits in question.

"You can win the captive supply case," Domina reiterates. "You can win them because of common sense of the cases. You can win the captive supply cases because you know that your market used to be days long and now it's minutes long. You can win the captive supply cases because you know that some of you bought your first cell phone so you wouldn't miss the buyer's call."

In a plea for support, Domina says the plaintiffs have 80 or 90 witnesses if the case goes to trial. They are going to have to transport the witnesses to Montgomery, Ala., for the trial and find lodging for them.

"We've put up a lot of money for you," Domina says. "If we win, we'll get some back. It's been a long time coming."

He says the plaintiffs need help.

"We need to have you support the people who are going to come," he says. "If there's a neighbor who lives nearby, who you know is involved in this case, feed his cattle or do whatever it takes so he can be in Montgomery, Ala. Do something to help him out."